SUPREME COURT, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

(4)

No. 94-1653

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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THE AMERICAN LIBRARY ASSOCIATION, *et al.*,
*Petitioners,*

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The Solicitor General's response to the petition fails to address the arguments made by petitioners. Instead, the government tries to minimize the burdensome impact of the Act and obscure the serious flaws of the D.C. Circuit's First Amendment analysis. The response demonstrates the vital need for this Court's guidance in this important area of constitutional law.

• The government does not dispute—nor could it—that the Act literally bans and criminalizes the sale and distribution of constitutionally protected speech. It does not dispute, for example, that the Act *bans* distribution of non-obscene images of adults if the producer has not attached the requisite disclosure label. Even though the distributor has no record-keeping or labeling obligations, the distributor is nevertheless forbidden to distribute constitutionally protected expression if the *producer* has not complied with the Act's record-keeping and labeling requirements. Compliance with the Act is completely out of the distributor's control. Yet it is a felony for the distributor to exercise his or her constitutional right to distribute non-obscene images of adults. The government simply ignores the Act's application to distributors.

Respondents misleadingly assert instead that "[t]he statute's record-creation and maintenance requirements apply to those persons or entities most directly involved in the production of the most sexually explicit images." Op. Cert. at 2. To the contrary, only the so-called "primary producer" is directly involved in production. All other statutory producers, by definition, are *not* involved in the creation of the images. The Act's requirements apply equally to the magazine publisher to whom an image is submitted for publication, to anyone who duplicates the image in any fashion, to anyone who includes the images in an advertisement, and to anyone who edits a film or video. In addition, the Act applies to anyone who distributes the image. All are subject to criminal penalties for

exercising their First Amendment rights, even though none of them had anything to do with the creation of the image.

• The government argues that the Act applies to only a "narrow range of highly explicit materials." Op. Cert. at 17. The mainstream petitioners here, all of whom submitted unrebutted affidavits discussing the materials that would be affected by the Act, belie the government's view.

In any event, as the government has conceded throughout this litigation, virtually all the images subject to the Act are images of *adults*. And, although they may be "sexually explicit," those images are nonetheless entitled to full protection under the First Amendment. Indeed, the District Court found, based on the record evidence, that some of the material created by petitioners and others subject to the Act is highly political and entitled to "the highest degree of protection." Pet. App. 42a n.5.

This Act will impact cable programmers and operators, libraries, mainstream magazine publishers and their distributors, and films attended daily by hundreds of thousands of Americans. The government cannot marginalize the law's effect.

• Respondents argue that the Court should not grant certiorari because there is no conflict. Of course there is not. Because of the Act's serious impact on their speech rights, petitioners have been challenging the law since the passage of its predecessor, and there has been an injunction in place preventing the Act's enforcement. Where, as here, a federal statute applies to myriad speakers and directly implicates their First Amendment rights, the Court frequently grants review, especally where the case involves a facial challenge brought by such a broad-based coalition—and especially where the Court of Appeals committed such gross errors of First Amendment law.

This statutory scheme has twice been declared unconstitutional; the D.C. Circuit substantially upheld the current version of the Act only over a dissent. And there were strong dissents from the Court of Appeal's denial of the

petition for rehearing *en banc*. Despite respondents' disingenuous attempts to minimize the importance and impact of the case, it plainly merits review by this Court.

• Respondents argue that the Act can be challenged later, in defense to a criminal prosecution. This argument completely misses the point of petitioners' facial challenge. These mainstream organizations and entities have brought this lawsuit because, as they have testified in uncontroverted sworn statements, *they will cease producing or distributing images that are covered by the Act in order to avoid its severe and senseless burdens.* If the Act is not struck down, as a result of *this* challenge, a significant amount of constitutionally protected material will simply disappear. Judge Tatel's prediction will come true: "the greatest effect of this statute may thus well be to restrict . . . the flow of protected speech into the hands of galleries, stores, libraries, artists, and every adult who desires to see and hear it." Pet. App. 55a. It is no answer to say "wait for a prosecution." In the meantime, the Act will have needlessly chilled a substantial amount of constitutionally protected speech.

• Most remarkably, the government claims that the D.C. Circuit's content-neutrality analysis is a straightforward application of this Court's precedents and will not have any effect outside this case. Op. Cert. at 11. The government argues that a law that, *by its terms,* applies *directly* and *only* to speech of specified content, and where the law's substantial burdens can be avoided by speakers' self-censorship, is "content neutral." For the D.C. Circuit to so hold, and for the Solicitor General to so argue, itself demonstrates that there is fundamental confusion regarding the proper test for deciding whether a law is content-neutral. For this reason alone, the Court should grant review.

• The government attempts to compare this statute to the one at issue in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), which the Court noted had an "incidental effect on some speakers or messages but not others." *Id.*

at 791. But there is no "incidental" effect here. The statute *by its very terms* applies *only* to certain speakers with defined messages—only those who produce and distribute expressive material of specified content. It applies to no others. The effect could not be more direct.

The regulation at issue in *Ward* had nothing to do with the content of the music publicly performed. It regulated the sound-amplification of *all* music. There is no comparison to the Act's critical dependence on the content of the images produced and distributed.

In further contrast to *Ward*, this Act is *justified only* by reference to the content of the regulated speech. Congress sought to deter "child pornography"—sexual images of minors. The Act refers directly to the substantive child pornography statute for its definition of the content of the speech covered. 18 U.S.C. § 2257(h)(1). The justification has a direct and inextricable tie to the content of the regulated speech.

• Contrary to the government's argument, the Act does not regulate *conduct* (as opposed to speech). The Act's requirements apply *only* to expressive activity—the production and distribution of visual images. It does not even pretend to regulate the underlying activity—the posing of models and performers. Respondents repeatedly intone the phrase the "exploitation of children." Petitioners are as strongly opposed to such exploitation as are respondents, and they do everything in their power to prevent it. But the only "exploitation" the statute purports to address is expressive activity—production and distribution of visual images. The government cannot make this a non-speech activity by giving it a different name.

There is no comparison to *United States v. O'Brien*, 391 U.S. 367 (1968). The prohibition of draft-card burning in *O'Brien* "on its face deal[t] with conduct having no connection with speech." *Id.* at 375. There was "nothing necessarily expressive" about draft-card burning, and the *O'Brien* statute did not "punish only destruction engaged in for the purpose of expressing views." *Id.* The operation

of the statute was "limited to the noncommunicative aspect of O'Brien's conduct." *Id.* at 381. Here, in sharp contrast, the operation of the Act is *not* limited to the noncommunicative aspects of the conduct of producers and distributors. The regulation directly targets the *communication* of images, and punishes producers and distributors for their expressive activity. For these reasons, the Act cannot be subject to the *O'Brien* standard. The D.C. Circuit's and Solicitor General's contrary conclusion demonstrates real confusion regarding this Court's controlling First Amendment precedents.

• The Solicitor General's discussion of this Court's recent decision in *Turner Broadcasting Systems, Inc. v. FCC*, 114 S.Ct. 2445 (1994), also reflected in the D.C. Circuit's decision, demonstrates a fundamental misunderstanding of that important decision, as well.

Petitioners do not contend—as respondents would have it—that the government's purported purpose is irrelevant to the content-neutrality analysis. Op. Cert. at 12. Rather, petitioners pointed out that this Court, in *Turner*—following a long line of First Amendment cases [1]—reiterated that a seemingly content-neutral purpose is not enough to avoid strict scrutiny. This Court could not have stated it more plainly: a "mere assertion of a content-neutral purpose" is insufficient "to save a law which, on its face, *discriminates* based on content." 114 S.Ct. at 2459 (emphasis added).

The Solicitor General simply rewrites the *Turner* Court's holding. The government claims that what this Court really meant in *Turner* was that a content-neutral purpose is insufficient to save a law which on its face *bans* speech based on content. *See* Opp. Cert. at 13 (arguing

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[1] *See, e.g., Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 480 U.S. 575 (1983) (tax on paper and ink that applied to certain newspapers is subject to strict scrutiny); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same regarding tax scheme applied only to magazines of specified content).

there is no problem under *Turner* because the Act permits producers and distributors of sexually oriented material to exercise their speech rights so long as they comply with the law). *Turner*, however, does not distinguish between a burden and a ban on speech. Indeed, the case itself involved a *burden* on speech, not a ban.[2] The ban-burden distinction the government (and the D.C. Circuit) seek to draw is flatly inconsistent with this Court's jurisprudence (*see* the numerous cases cited in Pet. at 17). The question, for purposes of determining content-neutrality, is whether the statute makes a distinction—"discriminates"—on the basis of content. The D.C. Circuit's complete rejection of this inquiry cannot be squared with this Court's precedents and must be reversed.

• The government's analogy to *Renton v. City of St. Paul*, 475 U.S. 41 (1986), displays a similar serious misconstruction of this important area of First Amendment law. *Renton* involved the government's attempt to regulate the "secondary effects" of adult movie theaters. This case involves neither "effects" nor anything "secondary." The exploitation of children through their use in child pornography is not an *effect* of the production and distribution of such sexually explicit visual images. If anything, it is a necessary *precedent* to production; the production could not happen without it. It is, in fact, part and parcel of that production. For that reason, the Act *directly* targets and burdens the expressive activity—the production of visual images. The correct analogy would be if the law at issue in *Renton* had been intended to deter the *production* of the adult movies shown in the theaters; but it was not. It was concerned, instead, with the *non*-expressive "secondary effects" that were thought to be associated with adult theaters—loitering, prostitu-

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[2] *See also, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988); *Talley v. California*, 362 U.S. 60 (1960), all of which applied strict scrutiny to disclosure and recordkeeping laws that burdened but did not ban speech.

tion, etc.—and could therefore be deemed "content-neutral" in purpose.

• The government's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is most ironic. *See* Op. Cert. at 18. There, the Court reviewed analogous record-keeping and disclosure requirements under *strict scrutiny*. *Accord FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Riley v. National Fed. of the Blind*, 487 U.S. 781, 798 (1988); *id.* at 803 (Scalia, J., dissenting). Far from supporting the D.C. Circuit's analysis, *Buckley* demonstrates just how divergent from this Court's precedents the Court of Appeal's First Amendment analysis was.

• Respondents' attempt to distinguish this case from cases in which other Circuit Courts have held similar laws to be content-based and therefore subject to strict scrutiny is specious. *See* Op. Cert. at 14 n.5. Contrary to the government's assertion, those cases involved statutes (restricting access to "dial-a-porn" telephone messages) that were just as much concerned with regulating *speech* as is the Act at issue here. *See* Petn. at 17.

• Respondents admit, as they must, that the record-keeping and labeling requirements of the Act cannot serve Congress' *stated* purpose of making the prosecution of child pornography easier. The records will not help prosecutors determine the age of those depicted; nor will they undermine any child pornographer's defense of ignorance of age. The reason is simple: the Act prohibits the use of the records *or any evidence gleaned from them* in any child pornography prosecution.

As a result, the government is forced to come up with some other purpose the burdensome Act purportedly serves. Our point—to which respondents utterly fail to respond—is that there is no evidence to support the government's newly found purpose or the assertion that the Act furthers that purpose. The government has simply made it up.

It does not matter whether the government's prediction that a producer forced to look at identification documents would not use a minor is true. The government has never been able to demonstrate that there are producers that are currently deceiving themselves about models' ages who would be deterred by the Act. The government deals entirely in hypotheticals and speculation.

Indeed, the evidence demonstrates that there is no such body of individuals. The government's own report found that child pornography is distinct from commercial production and distribution, and exists primarily "underground." 1 Att'y General Comm'n on Pornography Final Report 405-10 (1986). *Accord Osborne v. Ohio*, 495 U.S. 103, 110 (1990). In fact, the only example the government has ever come up with is Tracy Lords, who affirmatively deceived commercial producers into believing she was not a minor by using fake identification. *See United States v. United States D. Ct.*, 858 F.2d 534, 540 (9th Cir. 1988). The identification she used, though forged, would have been sufficient to meet the requirements of the Act. Accordingly, the Act would *not* have alerted producers to her minority.

The Solicitor General makes no attempt to square his speculations, hypotheticals and predictions with this Court's mandate that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995) (quoting *Turner*, 114 S.Ct. at 2450). Indeed, the government simply ignores the Court's holding in *NTEU*. Such blatant refusal to follow this Court's precedents should not be tolerated.

This Court has been very clear. The government cannot impose burdens on First Amendment speakers without demonstrating that there is a need for those burdens and that the burdens will help solve the demonstrated

problem. In the name of stemming child pornography—a concededly important goal—the D.C. Circuit and the Solicitor General simply ignore this Court's constitutional directives. First Amendment standards do not change in this context. And this Court must make that clear.

• The government does not even address petitioners' argument that the Act burdens and deters *substantially* more speech—*i.e. all* speech involving images of *adults*, which will constitute virtually *every* image for which the burdensome records will be compiled and maintained—than is reasonably necessary to deter child pornography. *See Ward*, 491 U.S. at 799. To begin, the government does not even pretend that the Act will deter *real* child pornographers—those who purposefully use minors; according to the government, the Act is aimed only at those who are negligent or reckless in their use of minors. If Congress really was concerned that producers were deceiving themselves about the age of the performers they use, it could easily have passed a statute expressly providing that ignorance of age is no defense to a child pornography prosecution. Or, as Judge Tatel suggested, why not "impose criminal liability upon those who recklessly or negligently violate [the child pornography laws]"? Pet. App. at 54a. Such laws would *directly* deter child pornography without the overwhelming burden on protected speech imposed by the Act.

The Solicitor General's response seems to be that Congress thought the Act's approach, applying its record-keeping burdens almost entirely to the production and distribution of *adult* images, was appropriate. The fact that the Solicitor General can even argue that such a law burdens no more speech than is reasonably necessary illustrates confusion regarding the meaning of *O'Brien*'s tailoring requirement, and warrants review.

• The government contends—without support or explanation—that the substantial burdens imposed by the Act are "no greater" than those arising from existing laws of general application. The government is wrong. As we have previously explained, and the government has made

no attempt to dispute, no law imposes similar requirements. Petn at 13. Moreover, *none* of the laws respondents cite is aimed at First Amendment activity; none applies only to First Amendment speakers; none treats speakers differently than every other type of entity. Record-keeping laws that impose no burden on speech obviously do not implicate the First Amendment. Plainly, the existence of such laws does not justify, under First Amendment analysis, laws that *do* burden speech.

* * *

The D.C. Circuit's content-neutrality analysis is unprecedented and directly conflicts with this Court's First Amendment jurisprudence, articulated as recently as this Term. The Court of Appeals held, and the Solicitor General argues, that a law that applies directly and solely to speakers who engage in speech of specified content is nonetheless content-neutral. Even though the speaker could change the content of his speech and thereby avoid the burdens imposed by the Act—a factor the *Turner* Court described as epitomizing a content-based law—the D.C. Circuit held the Act is *not* content-based and therefore is not subject to strict scrutiny.

Whether a statute is content-based or content-neutral is a critical and often difficult question. *See Turner*, 114 S.Ct. at 2459. The decision below, and the arguments of the Solicitor General, vividly illustrate the need for further clarification, by this Court, of the test for deciding whether a law is content-neutral. This case would be an excellent vehicle for such clarification.[3]

## CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

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[3] This Court need not decide whether the Act *violates* the First Amendment. That decision could be made by the Court of Appeals on remand.

Respectfully submitted,

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